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### Object and effect

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*Published in:*  
Competition Law Review

*Publication date:*  
2016

*Licence:*  
No Licence / Unknown

*Document Version*  
Publisher's PDF, also known as Version of record

[Link to publication in Discovery Research Portal](#)

*Citation for published version (APA):*  
Dnes, S. (2016). Object and effect: What role for structured evidence rules? *Competition Law Review*, 11(2), 239-254.

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## THE COMPETITION LAW REVIEW

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Volume 11 Issue 2 pp 239-254

April 2016

### Object and effect: What role for structured evidence rules?

*Stephen Dnes\**

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Recent decisions of the EU courts on the object/effect distinction have left a wake of widespread discussion about the proper role for economic evidence in Article 101(1) TFEU. The fast pace of development in the industries involved in a number of recent cases such as *Allianz* and *Cartes Bancaires* pose issues for the structured analysis implied by the object/effect distinction. Complex issues such as two-sided market dynamics, large economies of scale, and unclear entry dynamics stretch the interface between law and economics further than before. As the dust settles over Article 101(1) following the recent cases, pressing questions include how doctrine surrounding the object/effect distinction is accommodating developments in economic thinking, whether the distinction has changed, and how this fits into a wider picture of changing approaches to economic evidence in competition law cases. This article will consider the developing approach to the treatment of evidence under Article 101 TFEU, to suggest an important and discrete role for the object label.

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### I. INTRODUCTION

Recent EU competition law cases have resurrected a long standing debate on the role of categorisation under Article 101 TFEU, which bans anti-competitive agreements and practices in the EU.<sup>1</sup> The text of Article 101 draws a distinction between cases whose object is found to be anti-competitive, and those whose effects are so found. In the former case, an object infringement can lead to liability in the absence of the collection of detailed evidence on the effects of the practice, the objective sufficing to found liability. By contrast, if a case does not fit into this object categorisation, a more detailed analysis of the effects of the case is required.<sup>2</sup>

The distinction between object and effect under Article 101 TFEU raises significant questions about the treatment of economic evidence in EU competition law. Enforcers are likely to show a preference for the object category, reflecting the truncated evidence gathering involved. In places, truncated evidence is of course entirely appropriate, as explored below. Resource-constraints faced by enforcers, and wider deterrence objectives, suggest that some limit to evidence gathering is merited. A clear object case,

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<sup>1</sup> The detailed text of Article 101 TFEU will, of course, be eminently familiar to many readers, but bears repeating in part: "The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market"

<sup>2</sup> See e.g. Case C-345/14 *SLA 'Maxima Latvija' v Konkurences padome*, ECLI:EU:C:2015:784.

such as a cartel, does not call for substantial resources to be wasted in excessive evidence gathering, which would make optimal deterrence of cartels more difficult by diluting total enforcement in the clearest cases of competitive harm.

The very simplicity that makes truncated evidence gathering appropriate in cases of clear competitive harm, makes the same treatment inappropriate for cases of ambivalent effects. If, for instance, a nuanced vertical restraint might have positive or negative impacts on consumer welfare, or total output, depending on context, a more nuanced analysis is called for to assess whether and in what contexts competitive harm might exist. There is a significant possibility in such cases that overenforcement might be as problematic as underenforcement, in contrast to the clear-cut cases of competitive harm. This issue introduces a potent tension in the cases, which must structure evidence rules to collect suitable amounts of evidence in each context.

This paper will assess the extent to which recent cases on object and effect have arrived at optimal evidence rules. To do so, it will provide: (i) an analysis of recent cases addressing the distinction between object and effect; (ii) an overview of some economic literature relevant to evidence rules, and (iii) a tentative suggestion that certain existing attempts to clarify the object and effect boundary from the most recent cases and guidance could be developed to provide greater clarity in demarcating object and effect.

## II. RECENT OBJECT AND EFFECT CASES AND GUIDANCE

The distinction between the object and effect categories has been analysed many times by the EU courts over the decades, including foundational analysis in early cases such as *LTM*.<sup>3</sup> In *Consten*, the court identified a legal standard by which object cases would be assessed under a truncated evidence rule by which anti-competitive effects would be assumed.<sup>4</sup>

The court left the precise demarcation of the line between object and effect to develop in future cases. A number of recent cases have sought to shed light on the distinction, with particularly detailed analysis emerging from a line of cases including *GlaxoSmithKline*, *T-Mobile Netherlands*, *Beef Industry Development Society*, *Allianz*, and *Cartes Bancaires*.<sup>5</sup> Most recently of all, the Court of Justice of the EU (“CJEU”) handed down its judgment in *SLA Maxima Latvija*.<sup>6</sup> Each case develops the object and effect distinction in a particular context. As we shall see, the holdings in the cases make the overarching tests to be applied in each case clear enough, but questions arise as to their precise meaning in context.

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<sup>3</sup> Case 56/65 *LTM* [1966] ECR 235.

<sup>4</sup> Joined cases 56 and 58/64 *Consten and Grundig v Commission* [1966] E.C.R. 299.

<sup>5</sup> Joined cases C-501/06 P, C-513/06 P, C-515/06 P & C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* ECLI:EU:C:2009:610 [2009] ECR I-9291; Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529; Case C-209/07 *BIDS* [2008] ECR I-8637; Case C-32/11 *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160; and, Case C-67/13 P *CB v Commission* ECLI:EU:C:2014:2204.

<sup>6</sup> Case C-345/14 *Maxima Latvija* ECLI:EU:C:2015:784.

## i. Beef Industry Development Society

Recent attention to the object and effect distinction can be traced to the 2008 judgment of the ECJ in *Beef Industry Development Society* (“BIDS”).<sup>7</sup> The case fits into a wider line of caselaw in which industrial policy and competition policy interact, resulting in a complicated case context.<sup>8</sup> The case concerned the recurrent problem of how competition law should deal with industrial overcapacity. To compensate what were referred to as “goers” in the beef processing industry, “stayers” would pay those exiting set prices based on historical processing volumes.<sup>9</sup>

Setting the tone for a number of subsequent cases,<sup>10</sup> the ECJ rejected the argument for an effects-based analysis of the agreements, instead placing the agreements firmly in the object box.<sup>11</sup> The industrial policy argument for supervised restructuring fell on deaf ears, the court emphasising, in no uncertain terms, the role for market-based restructuring in the face of overcapacity, stating that in the absence of the agreements the processors would have:

...no means of improving their profitability other than by intensifying their commercial rivalry or resorting to concentrations. With the BIDS arrangements it would be possible for them to avoid such a process and to share a large part of the costs involved in increasing the degree of market concentration as a result, in particular, of the levy of EUR 2 per head processed by each of the stayers.<sup>12</sup>

The strict treatment of the agreements might be easily understood in context, with the per head processing levy acting on a threshold so as to be a powerful disincentive to expand production, even in the case of a more efficient processor, as the levy would apply to all producers regardless of efficiency. The argument of BIDS to the contrary that the object category should be restricted to cases not requiring an economic analysis to establish their anti-competitive potential was expressly rejected.<sup>13</sup>

## ii. T-Mobile Netherlands

The heightened attention of competition lawyers to the object and effect distinction can be traced to a considerable degree to the 2009 ECJ decision in *T-Mobile Netherlands*. The case concerned discussions between five Dutch mobile phone operators on the reduction of commission payments to distributors.<sup>14</sup> As the information exchange occurred only once,<sup>15</sup> and without surrounding evidence of any ongoing discussion,<sup>16</sup>

<sup>7</sup> Case C-209/07 *BIDS* [2008] ECR I-8637

<sup>8</sup> See e.g. Case C-7/95 *Deere v Commission* (rule on compulsion for state aid defence where government forces anti-competitive activity).

<sup>9</sup> *BIDS* [8]

<sup>10</sup> See especially the discussion of *GSK* below.

<sup>11</sup> *BIDS* [40]

<sup>12</sup> *BIDS* [35]

<sup>13</sup> *BIDS* [22]

<sup>14</sup> *T-Mobile* [12].

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

the conduct provided a perfect test case for the line between object and effect, since the effect of a single information exchange is likely to be relatively modest. The application of the object label would therefore seem to be particularly potent in the context of the conduct, although of course in certain contexts even one meeting could be problematic.

Despite the relatively limited scope of the infringement, the ECJ took a strict line against the conduct in question, by describing a relatively broad object box into which the conduct could easily fit. First, the court noted that conduct that is merely capable of an anti-competitive impact can fit within the object box.<sup>17</sup> It also noted that such an information exchange can impair competition in the context of an oligopolistic market.<sup>18</sup> In the court's view, it is not necessary for any impact on prices to be seen.<sup>19</sup> Referring to potential effects, the court instead preserved discretion on the part of the enforcer even in the absence of "a direct link between that practice and consumer prices."<sup>20</sup> Thus, the conduct could potentially fall within the object box, despite the conduct being a one-off information exchange with arguable impacts on actual competition.

### iii. GlaxoSmithKline

Perhaps the most philosophical approach to the object and effect distinction of recent years can be seen in the *GlaxoSmithKline* litigation. In notable contrast to the Court of First Instance (now General Court), the CJEU provided a detailed analysis noted especially for its approach to consumer welfare standards. Briefly, GSK had sought to differentiate export pricing for pharmaceutical products, but suggested that this might be justified by net welfare results.<sup>21</sup> The Article 101(3) interpretation offered by GSK, by which a consumer welfare standard might justify the conduct, was roundly rejected by the CJEU.<sup>22</sup>

In addition to its important clarification on Article 101(3), the court also considered whether GSK's policy might be considered an object infringement. First, the court reiterated the familiar standard by which all Article 101 cases are to be assessed with reference to a degree of context:

According to settled case-law, in order to assess the anti-competitive nature of an agreement, regard must be had *inter alia* to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part ... although the parties' intention is not a necessary factor in determining

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<sup>17</sup> *T-Mobile* [31].

<sup>18</sup> *T-Mobile* [34].

<sup>19</sup> *T-Mobile* [36] and [39].

<sup>20</sup> *Id.*

<sup>21</sup> *GSK* CJEU judgment [49]. The argument on potential gains to consumer welfare from parallel trade will be familiar to economists as being somewhat similar in effect to Ramsay pricing, a form of price discrimination by which consumers pay a price equal to the marginal value of the product, which is thought to be potentially an economically efficient approach to price discrimination.

<sup>22</sup> *GSK* [55].

whether an agreement is restrictive, there is nothing prohibiting the Commission or the Community judicature from taking that aspect into account.<sup>23</sup>

In response to the arguments on consumer welfare, as with its analysis of Article 101(3) the court upheld a strong standard by which almost all parallel trade bans are very likely to be considered to fall within the object category.<sup>24</sup> On the CJEU's analysis, almost any parallel trade ban will thus lie squarely in the object box.

#### iv. Murphy

Parallel trade featured prominently again in the *Murphy* case,<sup>25</sup> a well-known CJEU decision on the validity of territorial restrictions designed to segment parts of the internal market to reflect licensing obligations. Briefly, the case concerned attempts by a British pub owner, Karen Murphy, to purchase a satellite decoder card from Greece in order to display football matches in her pub for a much lower price than the prevailing price for a similar service in the UK. The case posed significant challenges because it fell squarely within the tension between gains from market integration and possibly welfare-enhancing price discrimination between licensing territories. As will be familiar to those following the current Digital Single Market proposals of the EU, one potential result of the creation of a *de facto* single licence territory across the EU, under EU competition law, could be the withdrawal of certain licences in territories with a lower prevailing price or the adoption of an average price with the same effect. Perhaps reflecting these underlying economics, the CJEU has always tolerated a degree more segmentation where intellectual property rights are concerned, under the venerable *Coditel* precedent.<sup>26</sup>

The case engaged many of the TFEU provisions on free movement, but the Court also provided guidance on the object and effect distinction under Article 101 TFEU. Here, the Court suggested that a licence agreement designed to divide the common market has the object to restrict competition:

where a licence agreement is designed to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have as its object the restriction of competition, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition.<sup>27</sup>

Although the Court clarified that the *grant* of an exclusive territorial licence “is not called into question”, under *Coditel*,<sup>28</sup> it nonetheless identified an anticompetitive object in measures designed to “eliminate all competition between licence holders”, even

<sup>23</sup> *GSK* [58].

<sup>24</sup> *GSK* [59] (“With respect to parallel trade, the Court has already held that, in principle, agreements aimed at prohibiting or limiting parallel trade have as their object the prevention of competition”).

<sup>25</sup> Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd* ECLI:EU:C:2011:631 [2011] ECR I-9083.

<sup>26</sup> Case 262/81 *Coditel and Others* (“*Coditel II*”) [1982] ECR 3381, paragraph 15.

<sup>27</sup> *Murphy* para 140.

<sup>28</sup> *Murphy* para 141.

though this might be thought to be the essence of the exclusive licence upheld by *Coditel*.<sup>29</sup> Cryptically, the Court suggests that contextual factors might have avoided this finding,<sup>30</sup> envisioning some kind of effects-based analysis, but not stating what this analysis would encompass. It may be fairest to say that the case takes a relatively strict approach given the cross-border context of the restrictions at issue, and that its full implications will be worked out subsequently, possibly in the context of legislation under the Digital Single Market programme.

## **v. Pierre Farbre**

A similar theme can be seen in the *Pierre Farbre* case, in which a requirement for cosmetic and personal care products to be sold only in the presence of licenced pharmacist was held to be a restriction of competition by object, since such a requirement was held to be a *de facto* ban on internet sales.<sup>31</sup> The question arose whether such a ban must necessarily be an object infringement. As the case concerned a preliminary reference, the Court preserved some latitude on the part of the referring court to determine the relevant context,<sup>32</sup> but nonetheless laid down firm guidance that a *de facto* ban on internet sales in the context of selective distribution would be very unlikely indeed ever to be justified:<sup>33</sup> notably, arguments that personnel were needed to provide information on the correct use of the product received short shrift.<sup>34</sup> As with *Murphy*, the potential impact on cross-border sales appears to have led to a relatively broad reading of the object category, especially in cases where a preliminary reference is involved and the nexus to national competition authorities is that bit stronger.

## **vi. Allianz**

One of the most challenging cases for the distinction between object and effect in recent years has been the *Allianz* decision of the CJEU.<sup>35</sup> The case concerned a framework of agreements between insurers and body shops setting rates for car repairs. The court regarded certain agreements as horizontal in nature, while others were vertical, such as the agreements between brokers and insurers.<sup>36</sup> The anti-competitive narrative against the agreements was that they seemed likely to induce loyalty to particular insurance companies, such as by allowing threshold discounts. Nonetheless, the vertical nature of a number of agreements might have cautioned against too strict a

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<sup>29</sup> *Murphy* para 144.

<sup>30</sup> *Murphy* para 143 “FAPL and others and MPS have not put forward any circumstance falling within the economic and legal context of such clauses that would justify the finding that, despite the considerations set out in the preceding paragraph, those clauses are not liable to impair competition and therefore do not have an anticompetitive object.”

<sup>31</sup> Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* [2011] ECR I-9419.

<sup>32</sup> *Pierre Fabre* para 42.

<sup>33</sup> *Pierre Fabre* para 47.

<sup>34</sup> *Pierre Fabre* para 44.

<sup>35</sup> Case C-32/11 *Allianz Hungária Biztosító and Others* ECLI:EU:C:2013:160.

<sup>36</sup> *Allianz* [11].

treatment, coupled with the frequency with which volume-based discounts are granted in some industries to reflect decreased costs.

Although there was certainly potential for such agreements to be anti-competitive, their competitive effects were therefore more arguable, and perhaps less clear than would merit placement in the object box. Significantly, the court answered the preliminary reference by repeating permissive language from earlier cases that would allow object infringements on the basis of possible effects.<sup>37</sup> Most notably, the court adopted highly permissive language allowing authorities broad discretion to place vertical agreements in the object category:

While vertical agreements are, by their nature, often less damaging to competition than horizontal agreements, they can, nevertheless, in some cases, also have a particularly significant restrictive potential.<sup>38</sup>

Of course, some vertical agreements can be highly anti-competitive. Nonetheless, the strongly permissive approach of the Court to accommodating vertical agreements into the object category will come as a surprise to competition lawyers who might have thought, that, other things being equal, more evidence might merit gathering when a vertical agreement is involved.

## vii. Expedia

Shortly after *Allianz*, the Court revisited the object category in *Expedia*.<sup>39</sup> The case was perhaps less controversial than a number of those above, because the litigation turned primarily on the question of the requirement for an effect on trade in the context of a de minimis provision in domestic law, which mirrors similar provisions at the EU level.<sup>40</sup> As with *Allianz*, the case concerned an agreement primarily vertical in character, although with an element of horizontal competition to the extent that both parties involved operate online booking platforms; here, the French train operator SNCF, and the online travel agent Expedia. A preliminary reference arose when national litigation suggested that de minimis provisions in national legislation, mirroring the position thought to prevail at the EU level, did not necessarily bar enforcement.

It will be perhaps unsurprising in light of the above cases that the Court took a relatively broad approach to the necessary effect on trade, conceptualising the evidence standard as follows: “an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.”<sup>41</sup> As with *Allianz*, this introduces scope to include conduct with a vertical element in the object box. It is notable that European Commission guidance issued

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<sup>37</sup> *Allianz* [38].

<sup>38</sup> *Allianz* [43].

<sup>39</sup> Case C-226/11 *Expedia Inc v Autorité de la concurrence and Others* ECLI:EU:C:2012:795.

<sup>40</sup> Communication from the Commission — Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C 291/01

<sup>41</sup> *Expedia* [37].



shortly after the case applies a relatively narrow interpretation of its holding, as discussed further below.<sup>42</sup>

### **viii. Cartes Bancaires**

Against the backdrop of the somewhat expansive treatment of the object category in *Expedia*, those watching the development of the object category paid great attention to the *Cartes Bancaires* case, which appeared in late 2014.<sup>43</sup> The case concerned agreements between members of a bank card issuing scheme to finance the operation of a shared payment card system. In notable contrast to the permissive treatment in the earlier cases, the court took a more measured approach to demarcating object and effect, drawing on Advocate General Wahl's opinion, which stated:

Only conduct whose harmful nature is proven and easily identifiable, in the light of experience and economics, should therefore be regarded as a restriction of competition by object, and not agreements which, having regard to their context, have ambivalent effects on the market or which produce ancillary restrictive effects necessary for the pursuit of a main objective which does not restrict competition.<sup>44</sup>

Referring to the object category as a “formalist approach”, AG Wahl emphasised the significance of the object category in relieving the enforcement authority of proving effects, and concluded that “an uncontrolled expansion of conduct covered by restrictions by object is dangerous having regard to the principles which must govern evidence and the burden of proof in relation to anticompetitive conduct.”<sup>45</sup>

Under the influence of AG Wahl's powerful Opinion, the court took a decidedly different approach to demarcating object and effect than was seen in the earlier cases. Referring to nuanced effects-based points, such as the complex two-sided nature of the market in question,<sup>46</sup> the CJEU noted that the General Court had gone into significant effects-based weighing in the course of finding an object infringement.<sup>47</sup> Thus, the GC was found to have erred in law in basing a finding of an object infringement on the basis of an effects analysis, pace AG Wahl's penetrating analysis.<sup>48</sup> In contrast to the *BIDS* case, where the aim of the agreements was thought to be the implementation of a common policy aiming to alter market structure, the *CB* restrictions were characterised more as an ancillary restraint designed to balance issuing and acquiring markets.<sup>49</sup>

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<sup>42</sup> Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) [2014] OJ C 291 [3].

<sup>43</sup> Case C-67/13 P *CB v Commission* ECLI:EU:C:2014:2204.

<sup>44</sup> *CB*, Opinion of AG Wahl [56].

<sup>45</sup> *CB*, Opinion of AG Wahl [57].

<sup>46</sup> *CB* [79].

<sup>47</sup> *CB* [82].

<sup>48</sup> *CB* [87].

<sup>49</sup> *CB* [84-5].

The difference in treatment between the *CB* and *BIDS* judgments is thus stark, and potentially highly significant to the extent that the CJEU has indicated that where a detailed effects analysis occurs, it must occur only pursuant to the application of the effect label. Whereas the line of cases from *T-Mobile* to *Allianz* had adopted permissive language on the scope to adopt object analysis, the *CB* court seemed more minded to emphasise the important role of effects analysis where the competitive impact of practices is more open to interpretation.

### ix. SIA ‘Maxima Latvija’

Following such a significant change to the analysis of the line between object and effect, the CJEU’s recent judgment in *SIA ‘Maxima Latvija’* seems likely to draw significant comment.<sup>50</sup> The case concerned contracts allowing a food retailer to veto leases granted to third parties in shopping centres in which it was the main tenant. The case applies a more stringent test for agreements to be placed in the object category suggests that *Cartes Bancaire* will be influential in the emerging case law, limiting the object box to cases with the greatest risk of harm.<sup>51</sup> Initial reports on the case suggested that *Cartes Bancaire* has had a significant impact, by replacing a permissive approach (could be object) with a more restrictive standard (is effects analysis inappropriate?): in the context of this debate, a seemingly small, but potentially highly significant change; especially in relation to vertical restraints.

### x. Commission Guidance

Although the object and effect boundary is primarily defined in case law, the important role of European Commission guidance on the subject should not be overlooked, since much practical enforcement discretion will be derived from Commission guidance.

In the wake of cases such as *Expedia* and their relatively expansive approach to the object category, it is significant that the Commission has published detailed guidance on the object concept in the form of the 2014 De Minimis Notice and the accompanying Working Document.<sup>52</sup> For the most part, the guidance provides detailed analysis of points which have yet to be litigated, such as the treatment of certain research and development agreements under competition law. Further detailed guidance rises to the challenge laid down by cases such as *Allianz* to define precisely which more nuanced agreements, such as vertical agreements, might fall within the object box, with reference to relevant market context such as whether parties are best considered horizontal competitors.

There is much to commend the Commission’s new guidance, which seems likely to provide the detailed guidance caselaw has left more open. Significantly, however, certain holdings from the recent object cases, such as the possibility of an object infringement despite the absence of any appreciable market impact from the activity as

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<sup>50</sup> Case C-345/14 *Maxima Latvija* ECLI:EU:C:2015:784.

<sup>51</sup> *Id.*

<sup>52</sup> Commission Staff Working Document, Guidance on restrictions of competition “by object” for the purpose of defining which agreements may benefit from the De Minimis Notice, SWD(2014) 198 final.

articulated in *Expedia*, are preserved; the Notice merely suggests that no fine would be applied in such a case.<sup>53</sup> Thus, even if the guidance looks set to provide a degree more clarity to the object and effect question, there would appear still to be scope for the open-ended nature of the object and effect case law to predominate.

#### **xi. Summary of recent cases and guidance**

The object and effect boundary has changed significantly in recent litigation. Until 2013, an observer could have been forgiven for thinking that certain cases seemed almost to go out of their way to provide a permissive and broad reading of object infringements, with little by way of limiting principle. As noted by AG Wahl in *Cartes Bancaires*, this approach poses concerns about the potential for important evidence gathering to be short-circuited, even in cases where a more detailed analysis could be relevant and useful, such as in cases of vertical restraints.

By contrast, 2013 and 2014 saw rapid developments in analysis, it would seem in response to AG Wahl's influential opinion as adopted in important part by the court. The permissive language of the earlier cases has been significantly cabined, by adding language on the importance of assessing effects in context as well. Most significantly, there appears now to be scope for legal error to be found on the basis that effects were considered, but an object label applied. This would seem to remove the troubling scope for authorities to cherry pick in their analysis under the standards applied above under which the door seemed wide open to *both* object *and* effect analysis, despite the issue, perceptively and persuasively pointed out by AG Wahl, that such a reading of the distinction would deny it its purpose. Thus the long-standing position that the provisions have substantial overlap would appear to be under attack, with significant moves towards a clearer line between the concepts. One interesting question to emerge from the new approach is whether the Commission would be as comfortable today in arguing for both object and effects, following the publication of its Working Paper.

### **III.ECONOMIC APPROACHES TO EVIDENCE RULES**

The object and effect distinction seems poised in recent cases to develop into a more detailed analysis by which greater definition would be given to determine which cases fall in the object category. This section of the paper will assess the desirability of this development in light of economic literature on (i) evidence rules and business conduct efficiencies and (ii) optimal information production under evidence rules. Both distinct areas of analysis suggest an important role for the distinction, but also suggest that the distinction should be clear to allow this role the fullest scope in which to operate.

#### **i. Evidence rules and business conduct efficiencies**

Perhaps the clearest economic point to be made in the context of the evidentiary posture of the object and effect rules is that a truncated analysis is justified in areas where there is very unlikely to be any material benefit from efficiencies generated by the practice, as a matter of economic substance. For example, a hardcore cartel is very

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<sup>53</sup> Paragraph 3 of the Notice.

unlikely to have any redeeming efficiencies.<sup>54</sup> By contrast, a vertical restraint such as those at issue in *Allianz* and *Maxima Latvija* could well have significant redeeming efficiencies. Care is always needed to check for harmful vertical restraints, which can certainly exist and do certainly cause harm in some contexts; the point is simply that they merit more information gathering on their effects, making an object rule inappropriate.

Beyond the point on likely efficiencies, it is also potentially significant that a hardcore cartel is likely to take steps to hide its activity, which is perhaps less likely – maybe even, less feasible – in the case of a vertical restraint. This could further justify the choice to truncate evidence gathering, since not only are there likely to be fewer redeeming virtues to be found as a matter of substance; it is also likely that the harm from the conduct is likely to be hidden.<sup>55</sup>

The above insight is very well established, not only in economic literature but also in a wide variety of guidelines applying economic theory through soft law.<sup>56</sup> In this context, it might be said that the EU courts have been a little slow to embrace the same nuance in their judicial review of Commission action. In marked contrast to significant discussion of the different competitive risks of vertical and horizontal activity in some other jurisdictions,<sup>57</sup> the EU cases discussed above show a marked tendency simply to state the *possibility* that a vertical restraint might be harmful, rather than to provide meaningfully determinative guidance on the relative risk levels posed by horizontal and vertical restrictions.

A reluctance clearly to differentiate evidence rules for different types of conduct might simply reflect a more deferential review, the merits of which is a separate question.<sup>58</sup> That said, it does not seem excessively ambitious to suggest that care should be taken in applying the object label to vertical activity, and that the law should reflect the lesser average risk posed by a vertical restraint as a matter of law under the object standard. The point is of particular salience, because of the tendency of some enforcers to favour the object category in order to truncate evidence gathering possibly out of administrative convenience, rather than out of a principled stand on the likely risk posed by the activity in question. EU level guidance from the Commission suggests that national competition authorities might be more careful in their approach to evidence in vertical cases, and it is unclear why slightly more precision on the relative risks of

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<sup>54</sup> For an interesting exception, see the OECD Roundtable on Crisis Cartels, available at: <http://www.oecd.org/competition/cartels/48948847.pdf>

<sup>55</sup> Richard A. Posner, “An Economic Theory of the Criminal Law”, 85 Columbia Law Review 1193 (1985).

<sup>56</sup> Most importantly, the EU *Guidelines on Vertical Restraints*, SEC(2010) 411, suggest an element of caution in weighing the pros and cons of vertical restraints at para 23, when referring to the importance of a finding of market power before concerns arise.

<sup>57</sup> See e.g. the (relatively permissive) discussion of the relevant standard for a finding of a hub and spoke cartel in *Argos Ltd & Anor v Office of Fair Trading* [2006] EWCA Civ 1318; under U.S. federal antitrust law, Judge Posner has referred to such arguments as being “ingenious but perverse.” *Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic* 65 F.3d 1406, 1410 (7th Cir. 1995).

<sup>58</sup> For a relatively rare example, see Lianos and Genakos, “Econometric Evidence in EU Competition Law: An Empirical and Theoretical Analysis”, UCL CELS Research Paper 6/12.

horizontal and vertical conduct should not be required by the EU courts as well. An important practical implication of such a change might be to diminish significantly the scope for divergent use of the object and effect labels across the EU, aligning them with settled economics.

## ii. Evidence rules and optimal information production

Another way in which evidence rules and economic theory interact lies in the impact such rules have on incentives to produce information. In the context of an increasingly economic approach to competition law in general, it is perhaps a little surprising that comparatively little attention has been paid to the question of economically optimal evidence rules in competition law. As a general matter, economic analysis of evidence rules is somewhat less advanced than the economic analysis of other areas of law, such as tort and crime.<sup>59</sup> Although relatively scarce, some examples discussing the structure of evidence rules from an economic perspective nonetheless do exist, including antitrust-specific discussions of evidence rules, as well as wider writing on the role of evidence rules from an economic perspective.<sup>60</sup> One of the more noted debates here concerns the economic implications of the choice between per se and rule of reason evidence standards. Pertinent points can also be made about considering the possible role an evidence screening rule might have to play.

### a. Per se and rule of reason

The debate about how precisely the distinction between per se and rule of reason analysis under U.S. federal antitrust law maps to EU competition law has been prominently debated.<sup>61</sup> One interesting point in the context of that debate is that regardless of how precise the parallel is in every regard, there is nonetheless functional similarity in the role of structured rules in optimal information gathering, regardless of whether that distinction is referred to as per se vs. rule of reason, or object vs. effect.

The evidence gathering properties of the per se rule under U.S. antitrust law is analysed in detail by Posner in the original edition of *Antitrust Law: An Economic Approach*.<sup>62</sup> Pointing out the differences between theories of harm based on conspiracy and monopoly, Posner makes the powerful point, in line with Becker's pioneering analysis, that conspiracies are likely to be hidden;<sup>63</sup> by contrast, monopolies will tend to be detected because those affected are likely to sue or complain.<sup>64</sup> The evidence rules

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<sup>59</sup> A lively debate on the analysis of evidence rules, and the insights an economic approach to the question might bring, including Richard Posner, "An Economic Approach to the Law of Evidence," 51 *Stan. L. Rev.* 1477 (1999), cf. Roger C. Park, "Grand Perspectives on Evidence Law," 87 *Virginia L. Rev.* 2055-2081 (2001) and other papers presented at the "New Perspectives on Evidence" symposium included in 87(8) *Va. L. Rev.* (2001).

<sup>60</sup> See Lianos and Genakos, n 58.

<sup>61</sup> R. Whish and B. Sufrin, "Article 85 and the Rule of Reason", 7 *YEL* 1-38 (1987).

<sup>62</sup> R. Posner, *Antitrust Law* (Chicago UP, 1978). The title for the second edition is truncated and refers simply to *Antitrust Law*.

<sup>63</sup> Posner (1978) 40.

<sup>64</sup> *Id.*

surrounding the two categories might deserve differentiation on the basis of the likelihood of *discovery*, therefore, rather than on the likelihood of *effects*. Thus, following Posner, one might consider that the clearest cases of competitive harm, which being well known to be illegal may well be hidden, deserve treatment in the doctrine to the effect that conspiratorial hiding merits a different evidentiary approach, on a deterrence basis, rather than on the basis of administrative expediency alone.

#### b. Optimal information production

A wider and non-antitrust specific point is made in the economic literature that evidence rules should promote optimal information gathering.<sup>65</sup> On an optimality approach, evidence gathering costs would be weighed against costs and benefits from legal enforcement. Evidence would be gathered on this approach where gathering the information leads to better decision making to a greater extent than the cost of the information gathering. Well-designed evidence rules would, therefore, attempt to assess the likely costs of activities, and the benefits from regulation, and weigh this against information production costs. In some cases, such as abusive or excessive discovery claims, too much information might be gathered, at excessive cost; in others, such as a nuanced and finely balanced competition policy question, a more detailed analysis, although expensive, might still be optimal to the extent that it might promote socially optimal information gathering.<sup>66</sup>

To a certain extent, the object and effect rules reflect exactly such a trade-off. In the worst object case, such as a hard-core cartel, a truncated analysis is very likely to reflect optimal information gathering in that the benefits from gathering further information are likely to be somewhat limited. In more equivocal cases, there might be clear benefit to further and more detailed information collection.<sup>67</sup>

It is, however, an open question whether the pre-2013 cases on the object category, including *Allianz* and *Expedia*, paid due regard to both sides of the net costs ledger. By applying an open-ended standard, it is not clear that any serious regard was had to the potential costs of chilling competitive conduct, which might well have been less than the information gathering costs associated with an effects analysis. In a more nuanced case such as *Cartes Bancaires*, the costs associated with gathering evidence might have been substantial, but also merited; if so, the stricter approach to agency discretion seen

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<sup>65</sup> Posner (1999), above n. 51.

<sup>66</sup> Recent suggestions that evidence rules might be sensitive to optimal enforcement concerns include Bierschbach and Stein, "Overenforcement," 93 *Geo. L.J.* (2005) 1743; Louis Kaplow, Burden of Proof, 121 *YALE L.J.* 738 (2012) (arguing for sensitivity to the gravity of harm in deciding the burden of proof), Cheng "Reconceptualizing the Burden of Proof," 122 *Yale Law Journal* 1254 (2013) (arguing for similar sensitivity), cf. Allen and Stein "Evidence, Probability and the Burden of Proof," 55 *Ariz. L.R.* 557 (2013) (arguing against statistical approaches to the burden of proof question).

<sup>67</sup> The point has been pithily put, in the context of a leading U.S. case, as follows: "We will never know how the Guild's style protection regime would have fared under that approach, though, because, when the Federal Trade Commission sued the Guild, the Supreme Court did not analyze the style protection system under the rule of reason but rather declared the system a "per se" violation of the antitrust laws, striking the Guild's style protection system more for the threat it posed to Congress's legislative power than the threat it posed to consumers' buying power." Nachbar, "The Antitrust Constitution," 99 *Iowa L. Rev.* 57, 59 (2013).

in *Cartes Bancaires*, even if costly, might be entirely merited. On the optimal information production point, then, the greater nuance introduced by AG Wahl, and so far at least partially followed by the court in *Cartes Bancaires* and *Maxima Latvija*, might be seen as a welcome development leading to a more balanced approach in which it is not automatically assumed that the object box is available without also considering, at the same time, the optimality of information gathering, consistent with an economic approach to structured evidence rules.

c. Evidence screens in the context of object and effect

The logical implication of the expanded role for effects-based analysis flowing from AG Wahl's Opinion in *Cartes Bancaires* is a more detailed case law on effects. It is an interesting point that, to date, the court seems to have been extremely reluctant to develop such a case law. Although instances of effects based analysis exists, there is little guidance on which effects count, and how, beyond *agency* documents such as the Commission's *Best Practices for the Submission of Economic Evidence and Data Collection*.<sup>68</sup> The court has, in the past, noted the importance of a full review of economic evidence, albeit with some deference,<sup>69</sup> so the absence of detailed jurisprudence on effects, rather than open-ended statements on what *might* count,<sup>70</sup> might be thought to be an area of jurisprudence that is set to develop. For instance, the difficult questions on two-sided markets covered by *Cartes Bancaires* could well be developed in more detail for the future, providing guidance on which elements of evidence are to drive the analysis.<sup>71</sup>

One interesting possibility in this context might be to adopt more detailed rules on the assessment of evidence, such as evidence screening rules. Other antitrust systems make use of detailed screening rules, notably the *Daubert* standard applied to expert evidence in the U.S., which provide some guidance as to the quality of the *source* of the evidence as a relevant factor in determining its likely probative value.<sup>72</sup> Active research projects are currently considering the role of evidence screens in EU competition law, and it will be interesting to see the outcome of the research on this point, in the context of an increasingly important role for effects-based analysis following *Cartes Bancaires*.<sup>73</sup>

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<sup>68</sup> DG Competition Staff Working Paper, Best Practices for the Submission of Economic Evidence and Data Collection in cases concerning the application of Articles 101 and 102 TFEU and in Merger Cases

<sup>69</sup> See e.g. Case T-170/06 *Alrosa* [122] (stating a deferential, but still relevant, review power).

<sup>70</sup> See e.g. Case C-234/89 *Delimitis* [24] (stating the standard for triggering Article 101(1) TFEU).

<sup>71</sup> An instructive parallel can be drawn with certain more mature jurisdictions, which at times show more comfort in handling detailed economic evidence. See e.g. *U.S. v. Oracle Corporation*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) and the recent Canadian Supreme Court judgment in *Tervita Corporation et al v Commissioner of Competition*, [2015] SCC 3. With time, effects cases in the EU could well take a similar turn and develop detailed doctrines on evidence.

<sup>72</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

<sup>73</sup> See Economic and Econometric Evidence in Competition Law: An Empirical Perspective (ongoing research project at University College London), details available at [https://www.ucl.ac.uk/cles/research\\_initiatives/eco-evidence-comp-law](https://www.ucl.ac.uk/cles/research_initiatives/eco-evidence-comp-law). See also I. Lianos and C. Genakos, "Econometric Evidence in EU competition law: an empirical and theoretical analysis" UCL Centre for Law, Economics and Society Working Paper 6/2012.

By contrast, the General Court in *MasterCard* took the remarkable decision that the optimal amount of expert evidence is zero, in its little noted decision to exclude detailed economic analysis contained in a number of annexes.<sup>74</sup> In this context it might be said that, although there will be a point at which the return to information gathering falls, it is unlikely to be at the very low amount of expert information gathering the court decided to credit in *MasterCard*.

#### IV. TOWARDS GREATER CLARITY IN OBJECT AND EFFECT?

The economic literature on evidence rules in the context of competition law is still developing. Nonetheless, a number of points can be drawn from it in the context of the contrast between object and effect under EU competition law. First, there would seem to be ample scope to consider the context of the demarcation between object and effect in a more detailed way. We saw above that an economic approach to the question stresses optimality in both (i) substantive rules, and (ii) in evidence gathering rules.

In terms of the substantive rules, there would appear to be a clear role for a clear rule on object to reflect differing relative average strength in vertical and horizontal theories of harm, not least because of the important distinction in that many (although not all) object cases are likely to be hidden and so information gathering costs are likely to be higher. It would appear that the most difficult object cases, i.e. those litigated, have all concerned conduct that was not hidden, perhaps hinting at an overexpansion of the object box. A case such as *BIDS*, for instance, would be difficult to hide. Yet as it is only the more borderline cases which are brought, the substantial scope for a clear rule on object in the very worst cases to deter hard-core cartel activity might be understated at the exact point at which the rules are set. The wider perspective on deterrence seen in the economic papers might suggest a greater role for identification of the very clearest hardcore cases, as distinct from the vertical cases that tend sometimes to be pursued as object cases, despite a reasonably strong case to assess their likely effects.

The point on evidence gathering is more nuanced, suggesting that it might give rise to more tentative conclusions. Once again, the object and effect distinction seems to have an important role to play to distinguish productive evidence gathering from wasteful evidence gathering. Recent developments in cases and guidance from 2014 onwards would seem to have been a substantial step towards reflecting this concern. Although the main features of the object and effect distinction were preserved in *Cartes Bancaires*, AG Wahl's influential articulation of potential issues with sub-optimal information gathering made a very sound policy point, just as collecting too much information would also be sub-optimal in the worst cases. Crucially, the evidence policy point from the Wahl opinion had an insightful legal hook that was adopted by the courts: by requiring any effects analysis to happen only under an effects umbrella, the Wahl opinion has led to a legal position that should make it much more difficult to make

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<sup>74</sup> See Case T-111/08 *MasterCard* [185] (faulting *MasterCard* for developing detailed economic arguments by means of annexes to its application, and refusing to take these into account where these contain important arguments that should, in the view of the court, have appeared in the application itself).



open-ended statements about competitive effects that might fit into the object box, without slipping into legal error in those cases where effects are, in fact, being weighed.

At the same time, Commission guidance has taken steps to limit the impact of the more open-ended elements of *Expedia* and *Allianz*, by providing greater detail on what fits into the object category, why, and also providing some scope to respond to a perhaps rather broad object category by using discretions relating to fines in those cases where competitive harm is less clear, but might still fall within the object box because of the open-ended legal tests sometimes articulated by the courts. In this way, the Commission has tied up some of the loose ends that a few of the pre-2014 judgements had left dangling.

Is it too soon to hope that the old chestnut of the line between object and effect has been radically clarified by Advocate General Wahl, and his sympathisers at the Commission? Time will tell, but the recent *Maxima Latvija* case would suggest that more nuance has come to bear on the question: although it was a vertical case, AG Wahl's influence can be clearly seen. At the very least, it might be hoped that on a more nuanced approach the *MasterCard* annexes might be considered and weighed by the courts, just as they would in so many other areas of law, rather than discredited on a procedural technicality.